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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 130

APEX DISTRIBUTING CO. INC., ALBERT A. FINER and JOSEPH R. SNYDER,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Apex Distributing Co. Inc., Albert A. Finer and Joseph R. Snyder,

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Petitioners herein respectfully submit this brief in reply to certain statements and arguments contained in the brief submitted by respondent in opposition to the petition for a writ of certiorari filed on their behalf. Petitioners know that the purpose of a reply brief is to answer only seriously erroneous statements of fact and arguments made in an opposing brief, and is not intended to restate all of a petitioner's arguments set forth in his initial pleading, and that other errors need not be challenged point by point.

With this preface, petitioners wish to state that they intend only to reply to one major erroneous statement of fact and argument made by the Government in its opposing brief, and it will be in terms of this point that they submit again that this case should be reviewed on certiorari by this Court. This point concerns petitioners' contention that the indictment in this case contained really only one alleged conspiracy which was broken up into two separate con-

spiracy counts solely for the purposes of prosecution, i.e., into counts one and eleven. (See petition herein, pp. 4, 5-8, 10, 40-41.)

It is to be remembered that the defendants charged in count 1 were Charles H. Gillilan, Albert A. Finer, Joseph R. Snyder, Apex Distributing Co. Inc., Wilshire Sales Associates, Inc. and Melrose Corporation (6a). The three defendant corporations were each the creatures of defendant Finer (3a-4a), and during the trial of this case there was no dispute as to this fact. The defendants named in count 11 were Gillilan, Finer, Snyder and Apex (21a). In other words, the Government eliminated from count 11 any alleged criminal participation of two of Finer's corporations, Wilshire and Melrose, although it incorporated in its pleading of count 11, paragraphs 1 and 2 of count 1 (21a, first paragraph of count 11). This incorporation by reference (see pp. 3a-6a) included the description and connection of all three of Finer's corporations, and let it be known that in essential part the two alleged conspiracies included all of the same individuals and none others. There are no other persons alleged to be co-defendants or co-conspirators not named as defendants in either of these two counts.

The time period covering these two alleged "separate" conspiracies are as follows:

> Count 1—From a date prior to January 1, 1954 to and including May 1, 1955 (6a).
>
> Count 11—From a date unknown to and including March 31, 1956 (21a).

As to count 11, the first alleged overt act is July 15, 1952 (24a); the last alleged overt act is September 22, 1955 (32a). Admiral Gillilan ostensibly and allegedly "joined" this count 11 conspiracy on October 31, 1953 (see Overt Act No. 19, p.

26a), which is "a date prior to the 1st day of January, 1954" (6a), the alleged starting date of the count 1 conspiracy. The Government does not pretend that Gillilan was allegedly in this conspiracy at any earlier time. As to the concluding or termination date of count 11, March 31, 1956, this date is fictitious since no activities subsequent to May 1955 were attempted to be or were proved by the prosecution. This was the time when Gillilan concededly had left Finer's employ (see paragraphs 1 and 3 of count 1, pp. 3a, 6a). It should be pointed out that Overt Act No. 32 of count 1 alleges the writing of a letter by defendant Snyder to the E. B. Evans Company, Philadelphia, Pennsylvania, on May 11, 1955 (11a), a date subsequent to the alleged approximate concluding date of this conspiracy, which is May 1, 1955, as set forth in paragraph 3 of this count (6a).

Then too, Overt Acts 1, 6, 8 and 13 of count 1 are identical with Overt Acts 19, 22, 24 and 27 of count 11 (see and compare, pp. 7a, 8a and 9a with pp. 26a and 27a), each allegedly committed in furtherance of these two "separate" conspiracies. The testimony to support the proof of these overt acts was received in evidence to prove both conspiracies without distinction.

As to the objects of the conspiracy, paragraph 4 of count 1 (6a-7a), alleged that in furtherance of that conspiracy Admiral Gillilan would be paid compensation for his services in soliciting and negotiating contracts for the sale of concentrated flavorings to the Navy Department. Paragraph 2b and c of count 11 alleged that this conspiracy was to defraud the United States of and concerning its right to have its Navy procurement personnel comply with procurement regulations "free from unlawful impairment by deceit, misrepresentations, false statements, and dishonesty" and "concerning its lawful right to have its contracts performed in accordance with their terms without fraudulent solicita-

tion and acceptance of orders thereunder" (21a-22a). Thus it is to be seen that the essential objects and characteristics of these alleged conspiracies was concerned with the procurement of contracts for the sale of concentrated flavorings to the Navy. The evidence at the trial was directed to the proof of this principal objective.

The Government's argument is that the conspiracies are separate. It states:

> "On its face, it (the count 1 conspiracy) is separate from and additional to the conspiracy to defraud in the actual making of sales, as charged in count eleven. The two conspiracies extended over different periods of time, and had different parties and different objects. The fact that a few of the overt acts committed in pursuance of the two conspiracies were the same is therefore immaterial. It was not necessary to the success of the conflict-of-interest conspiracy that the government be defrauded in any way, and conversely, the government could have been defrauded without any violation whatsoever of the conflict-of-interest laws by Admiral Gillilan. Petitioners could have been convicted on one and not the other count without any inconsistency in the jury's verdict" (p. 14, Brief for the United States in Opposition).

It has been shown above that the persons, time, objects and essential characteristics, as well as overt acts and proof, were the same in both alleged conspiracies. On the law, it is clear that we are here dealing really with only one alleged conspiracy and not two separate and distinct ones. *Braverman* v. *United States*, 317 U. S. 49; *Frohwerk* v. *United States*, 249 U. S. 204; *United States* v. *Rabinowich*, 238 U. S. 78; *United States* v. *Samuel Dunkel & Co.*, 184 F. 2d 894, cert. den. 304 U. S. 930; *United States* v. *Anderson*, 101 F. 2d 325, cert. den. 307 U. S. 625.

In 1919 this Court, in the *Frohwerk* case, faced with the argument that a single count in an indictment for conspiracy to commit two offenses is bad for duplicity, held that "the conspiracy is the crime, and that is one, however diverse its objects" (249 U. S. 204, 210). In the *Rabinowich* case in 1915, this Court held the conspiracy statute of limitations applicable to a prosecution for conspiracy to violate the Bankruptcy Act, rather than the shorter period prescribed for the substantive offense, on the ground that a conspiracy is not the commission of the underlying substantive crime and thus does not violate or arise under the statute whose violation is its object. *United States* v. *McElvain*, 272 U. S. 633, 638. Then in 1942, this Court in an unanimous decision, with an opinion by Mr. Chief Justice Stone, in the *Braverman* case, defined the "precise nature and extent of the conspiracy" concept in the following language:

> "For when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.
>
> . . . Since the single continuing agreement, which is the conspiracy here, thus embraces its criminal objects, it differs from successive acts, which violate a single penal statute and from a single act which violates two statutes" (317 U. S. 49, 53-54).

In the *Dunkel* case, the Court of Appeals for the Second Circuit wrote:

> "Here the accused were associated in business and were engaged in the common enterprise of putting off upon the United States egg powder, different from what they represented it to be. Pursuant to this purpose they presented false claims on several different occasions but this did not mean that each false claim was a separate conspiracy. Indeed had the Section 83 indictment so charged it would have violated the rule of Braverman v. United States, 317 U. S. 49, 63 S. Ct. 99, 87 L. Ed. 23, which forbids multiplying conspiracies where the evidence shows only one agreement" (184 F. 2d 894, 897).

It is to be noted that here the alleged separate conspiracies each were charged as violations of Title 18, United States Code, §371, the "general" conspiracy statute. Neither count was laid under any special conspiracy statute, but both were alleged to be contemporaneous conspiracies among the same persons in violation of the same statute. It is clear that the fragmentation of one conspiracy into two counts for the purposes of prosecution is an erroneous concept which should not be countenanced by this Court.

In the case at bar, the conspiracy alleged in the indictment had one essential objective, and that was the sale of goods to the Navy by Finer's firm, Apex. Whether fraud in the making of sales was contemplated, whether improper use of Admiral Gillilan's services was contemplated, whether improper selling activities was contemplated, and whether substitution of inferior goods for the ordered merchandise was contemplated, under the allegations of both conspiracy counts, only one conspiracy was really alleged and proof was introduced only to attempt to prove one

conspiracy. "The conspiracy is the crime, and that is one, however diverse its objects." *Frohwerk* v. *United States*, *supra*, 210; *Ford* v. *United States*, 273 U. S. 593.

Since the improper fragmentation of one alleged crime into several counts for the purposes of prosecution or punishment (see e.g., *Prince* v. *United States*, 352 U. S. 322, 325) is prohibited, it is submitted that the use of the device of fragmentation of one conspiracy into two counts of conspiracy is equally prohibited here. See Wechsler, Jones and Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy*, 61 Columbia Law Review, 957, 979-996 (1961).

It is therefore submitted that for the foregoing reasons the petition for a writ of certiorari in this case should be granted.

Respectfully submitted,

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September 21, 1961